In the
Supreme Court of the United States
OCTOBER TERM 1966

No. 529

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AND REQUEST TO SUPPLEMENT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Earl Welch, petitioner, submits herewith his reply to the respondent's brief in opposition to petitioner's petition for a writ of certiorari and a supplemental brief to his petition on file herein, pursuant to Rule 24(d) of the United States Supreme Court.

It is the purpose of this brief to supplement the petition for a writ of certiorari because of a decision by the United States Court of Appeals for the Ninth Circuit in *Lenske* v. *United States*,[1] which raises additional questions and es-

[1] The decision in the *Lenske* case was rendered by the Court of Appeals for the Ninth Circuit on October 5, 1966. That decision is reproduced in full as Appendix A, herein. The decision is not yet reported, but has appeared at CCH 1966 Standard Federal Tax Reports, paragraph 9686.

tablishes additional reasons for the granting of the writ in petitioner's case.[2]

Reply will also be made to certain issues raised in respondent's brief in opposition.

ADDITIONAL QUESTIONS PRESENTED

1. Was petitioner denied a fair trial where the government attorneys, in a net worth income tax evasion prosecution, instructed that the testimony before the grand jury of the special agent in charge of investigating petitioner's case not be transcribed thus depriving petitioner of any remedy affording access to such testimony, although the testimony of other witnesses, included that of petitioner, before the grand jury was transcribed, furnished to and used by government attorneys?

2. Should the judgment of the Court of Appeals be vacated and this cause remanded in order that the Court of Appeals may consider the question of whether petitioner was denied a fair trial by virtue of the government attorney's actions in regard to selectively transcribing the grand jury testimony of witnesses, since petitioner was denied the opportunity to present the issue to the Court of Appeals, the record having been sealed and petitioner not being advised of the facts contained in such record until the Court of Appeals rendered its final revised opinion denying rehearing?

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[2] Petitioner's attorneys advised the Solicitor General of their intention to raise this issue as soon as the decision in the *Lenske* case came to their attention. The respondent has dealt with the issue in the Brief of Opposition at page 9, note 5.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that the decision by the United States Court of Appeals for the Ninth Circuit in *Lenske* v. *United States,* — F.2d — (Oct. 5, 1966), raises additional reasons for granting a writ of certiorari to the Court of Appeals in the within case. The decision by the court below in the instant case is in conflict with the decision by the Court of Appeals for the Ninth Circuit in the *Lenske* case. The issue involved raises an important question concerning the administration of justice and petitioner's right to a fair trial can only be vindicated by a decision of this Court.

In the *Lenske* case, the Court of Appeals for the Ninth Circuit in a two to one decision, reversed the conviction of the defendant, who was tried for income tax evasion by use of the net worth method. As in this case, the special agent who was in charge of investigating the taxpayer testified at trial, at which time the defendant requested a copy of the witness' testimony before the grand jury. The following statement by the majority of the Court of Appeals for the Ninth Circuit succinctly sets forth the facts and the reasons why the actions by the government attorneys in that case, virtually identical with those taken in petitioner's case, constitute one of the grounds for the reversal of the conviction in the *Lenske* case:

> "One incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had

testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The court directed government counsel to check the record. Later government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the testimony of the Special Agent and the Revenue Agent was not transcribed.

"Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*"[3]

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[3] Appendix A, page xvii.

In petitioner's case, special agent Kaszubowski testified that he was the chief investigator for the Internal Revenue Service in building its case against the petitioner. Petitioner had requested a copy of the transcript of this witness' grand jury testimony prior to trial and renewed his motion during cross-examination at trial. Ra 4, 264. The trial court overruled both motions. Ra 10, 265. On petitioner's motion, the transcript of the grand jury testimony of the witness Kaszubowski was sealed and made a part of the record on appeal, being marked as Government's Exhibit 223.[4] At no time did government attorneys ever advise attorneys for petitioner that the special agent's testimony before the grand jury had not been transcribed.

Nor did the Court of Appeals below mention the fact that the special agent's testimony had not been transcribed in its original opinion handed down in petitioner's case. Page 18 of the original opinion by the Court of Appeals is reproduced as Appendix B herein, and contains the entire discussion by the Court of Appeals in its original opinion pertaining to this issue.

At the time it denied petitioner's petition for rehearing, the Court of Appeals below substituted a new page 18 in its opinion. Therein the Court stated:

> "Appellant asserts that the trial court erred in refusing to provide him copies of appellant's and the government witness Kaszubowski's testimony before

[4] Government's Exhibit 223 is a part of the record certified to this Court by the Clerk of the Court of Appeals for the Tenth Circuit.

> the grand jury. Judge Welch appeared voluntarily before the grand jury, testified at length, but did not testify in the case at bar. Kaszubowski testified both before the grand jury and in the case. However, this witness' testimony before the grand jury, except for some preliminary questions establishing identification, was not recorded. * * * The witness Kaszubowski's grand jury testimony did not exist in recorded detail except as we have indicated. The trial court did not invade the province of the advocate in refusing to produce it as a tool of defense utility."[5]

It is respectfully submitted that the decision by the Court of Appeals below is in conflict with that rendered by the Court of Appeals for the Ninth Circuit in the *Lenske* case. This is the first opportunity which petitioner has had to raise this issue, since the *Lenske* decision was handed down after the petition for a writ of certiorari was filed herein. Since petitioner had no knowledge of the fact that the witness Kaszubowski's testimony was not recorded until the opinion change was made by the Court of Appeals below in conjunction with denying petitioner's petition for rehearing, petitioner had no opportunity to present the issue to the District Court or the Court of Appeals.

Petitioner's case is virtually identical with that of the defendant in the *Lenske* case. Here, too, the net worth method of prosecution was utilized. Here, too, the government's special witness appeared before the grand jury and testified, but at the government attorney's direction, his

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[5] Rs 12-13 in the original petition on file herein.

testimony was not recorded.[6] However, the testimony of other witnesses before the grand jury was transcribed and used by the government at petitioner's trial. Indeed, the government was permitted to use the grand jury testimony of Ophia Taylor, petitioner's 80-year-old sister-in-law, against her at the trial with devastating effect, when the trial court gave the government leave to treat her as a hostile witness. Ra 168-170. And, of course, an enormous advantage was gained by government counsel who held petitioner's extensive grand jury testimony, but whose own chief witness could testify without fear of contradiction.

It is respectfully submitted that such actions by the government attorneys are "particularly offensive" and operated to deny petitioner a fair trial. The government attorneys are in complete charge of a grand jury proceeding, being unfettered either by the presence of opposing counsel or even by a trial judge. While there traditionally has been no requirement that the testimony of all the witnesses

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[6] Petitioner has been advised by a deputy clerk of the Court of Appeals for the Tenth Circuit that, in summary, Government's Exhibit 223 reveals that the special agent gave his name, testified that he had been a special agent for ten years, described his duties as a special agent; that he operated with a revenue agent, whose function it was to prepare the audits, whereas the special agent investigated for fraud; that he investigated Justice Corn for the years 1957 through 1960, and Justice Welch for the years 1957 through 1961; that he began his investigation in September, 1962, and finished in September, 1963. *The government attorney then stated that the government had a summary of the investigation and it was therefore not necessary to make a record of the agent's testimony to preserve it.* The note by the court reporter then reads: "Continued, off the record," followed by a notation that the reporter had left the room. Kaszubowski re-appeared before the grand jury the next day and stated that he had not quite finished his testimony, at which time the court reporter made the following notation: "Go off the record—court reporter left the room."

before a grand jury be transcribed, nevertheless, it is manifestly unfair for the government to be able to have transcribed the testimony of those witnesses which it expects to be able to use against them, but refrain from having transcribed the testimony of its own witnesses, which might be later used by the defendant in cross-examination. In the words of the Court of Appeals for the Ninth Circuit, the device used by the government prosecutors here was a "clever scheme, but one-sided and unfair." Such unfairness, especially in a net worth case, strikes at the heart of the precept laid down by this Court in *Holland* v. *United States*, 348 U.S. 121 (1954), that the strictest care must be exercised to insure the defendant of a fair trial in a net worth prosecution case.

It is respectfully submitted that these two cases will operate to create a direct conflict in the Ninth and Tenth Circuits if permitted to stand. The implicit holding in the Tenth Circuit case is that there is no prejudice in the government's action in transcribing the grand jury testimony of witnesses against whom it can use such a record, but refraining from transcribing the testimony of its own witnesses. On the other hand, such a practice will not now be permitted in the Ninth Circuit.

It is respectfully submitted that the decision in the *Lenske* case, when compared with the decision here below, raises an important issue in the administration of criminal justice which should be resolved by the Court. And, of course, petitioner's right to a fair trial can only be vindicated by the granting of the writ in this case.

In the alternative, petitioner requests that the judgment of the Court of Appeals below be vacated and the case remanded to the Court of Appeals for a consideration by it of this issue. 21 U.S.C. 2106; *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464 (1947). As noted above, petitioner never had an opportunity to present this question to the Court of Appeals since he was not advised either by government attorneys, or by any record in the District Court or in the Court of Appeals, that the government witness' grand jury testimony had not been transcribed, until the denial of his petition for rehearing before the Court of Appeals, at which time it was too late for him to present the issue to the Court of Appeals. It is respectfully submitted that petitioner is entitled to have a review by an appellate court of this question, whether by the granting of the writ by this Court, or by the Court of Appeals on remand.

REPLY TO BRIEF IN OPPOSITION

Brief reply should be made to some of the statements contained in the Brief for the United States in Opposition.

It is asserted at page 6 of the Brief in Opposition that prejudicial publicity was alleged for the first time in petitioner's motion for new trial. This is inaccurate. The problem of prejudicial trial publicity was raised by petitioner in both of his pre-trial motions, the motion for continuance and the motion to hear the testimony of certain witnesses in chambers. Both of these motions were resisted by the government and overruled by the court. Ra

11, 19, 21, 22. Petitioner could do no more to alert the trial court to the problem. *Meyer* v. *Cadwalader*, 49 Fed. 32, 36 (3rd Cir. 1891).

Further, the government's attempt to justify its public statement in Justice Corn's case, as set forth on page 7 of the Brief in Opposition, is incomplete at the decisive point. The government carefully omits the fact that it did not limit its statement of the alleged $150,000 bribe as having been paid to the defendant in the Corn case. The actual statement made was that the bribe was paid to Corn and "others" on the Supreme Court. Rs 23.

The government's phrasing in paragraph 3 of its "Questions Presented," page 2 of Brief in Opposition, begs the actual question raised by petitioner herein. The question is whether there was any evidence which would support the inference that the petitioner expended the funds for the house purchase in question. The evidence on the issue, detailed in the Petition, pp. 30-35, demonstrates that there was in fact no evidence which would support such an inference. Under these circumstances, the admission of the testimony of the three women about petitioner's relationship with a woman not at that time his wife was highly prejudicial and inflammatory, since it was never connected up to the case in chief against petitioner by any competent evidence. It is not denied by petitioner that the government in a net worth case can trace a defendant's financial history. Petitioner's assertion here is that this particular item in that financial history was not established by competent evidence, but was injected solely by innuendo of personal immorality not connected with the crime charged.

CONCLUSION

For the reasons set forth in his petition and in this supplement, it is respectfully submitted that a writ of certionari ought to issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, or in the alternative that the case be remanded to the Court of Appeals for the reasons set forth above.

Respectfully submitted,

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November, 1966

APPENDIX

APPENDIX A

Reuben G. Lenske, Appellant v. United States of America, Appellee.

U. S. Court of Appeals, 9th Circuit, No. 19,539, and No. 20,448, 10/5/66. Reversing an unreported District Court decision.

R. Lenske, Portland, Ore., pro se. Sidney Levak, United States Attorney, Portland, Ore. Mitchell Rogovin, Tax Division, Department of Justice, Washington, D. C. 20530, for defendant.

Before CHAMBERS, Circuit Judge, MADDEN, Judge of the United States Court of Claims, and HAMLEY, Circuit Judge.

MADDEN, Judge: The appellant Lenske will be referred to hereinafter as the defendant. In a trial without a jury in the district court he was convicted on three counts of evasion of federal income tax and on one count of willfully subscribing to a false income tax return. No. 19539 is his appeal from his conviction. No. 20448 is his appeal from the order of the district court denying his motion for a new trial in the case in which he was convicted, and from the order denying his motion to disqualify the trial judge from sitting, on a remand directed by this court.

The function of a Revenue Agent in the organization of the income tax division of the Bureau of Internal Revenue is to investigate situations in which a taxpayer may not have paid as much income tax as he should have paid. Such an investigation is for the purpose of determining whether there is occasion for the Government to take the steps prescribed by law to assess and collect additional taxes. If it appears that the situation may involve a fraudulent evasion of taxes for which a criminal prosecution

should be brought, a Special Agent is assigned to the case, and he is thereafter in charge of the investigation. In May, 1959, a Special Agent was assigned to the defendant's case. He and the Revenue Agent who was already working on the collection aspects of the case devoted their full time for the following two and one-half years to the investigation of the defendant's case.

On June 13, 1961, the Special Agent made his report to his superior, the District Director of Internal Revenue. The report consisted of 37 closely type-written pages, followed by an appendix of 84 pages which listed 468 exhibits, and the names and addresses of 315 witnesses who would be available to testify for the prosecution if criminal proceedings were initiated. The report recommended criminal prosecution. Near the beginning of the report, under the heading, "History of Taxpayer," after stating, among other things, that Lenske had been born in Russia, reared in Minneapolis, had been a resident of Portland, Oregon, since 1925, had lived in the same house since 1936, and had no known criminal record, the report continued:

> Representatives of the Federal Bureau of Investigation, Portland, and the Intelligence Division of the Portland Police Department stated that they have reason to believe that Mr. Lenske is a communist. In fact, they each maintain an extensive file on Mr. Lenske.

The report then stated that attached to the report were Exhibit 3A, a newspaper clipping stating that Lenske and another lawyer had called a meeting for the purpose of forming a local chapter of the Lawyers' Guild, and Exhibit 3B, which indicated "Mr. Lenske's thinking on the subject of Cuba, Laos, China, etc." We take judicial notice that the Lawyers' Guild is a national organization of left-wing lawyers. We take judicial notice that there is in this country

and in the world a great variety of "thoughts on Cuba, Laos, China, etc."

An examination of the exhibits shows that Exhibit 3A is a short news story saying that another lawyer and Lenske had called a meeting at a hotel for the purpose of organizing a local chapter of the Lawyer's Guild, and that a feature of the meeting would be the showing of a left-wing film "Operation Abolition." Exhibit 3B is a rather long letter to the editor, from Lenske, in which Lenske expresses the thought that in "Cuba, Laos, China, etc." this country's actions had been in violation of our own laws and treaties, and in violation of international law.

We reverse. This court will not place its stamp of approval upon a witch-hunt, a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. This court will not be so used.

When the Special Agent's report came in to his superiors, with his naive disclosure at the very beginning of his report that he placed high among the reasons why Lenske should be criminally prosecuted for income tax evasion Lenske's being a left-wing lawyer and having unorthodox political and social ideas, his superiors should have immediately removed him from the case and discarded every judgment which was contained in his recommendation. The Special Agent had given his superiors express notice that he was confused with regard to his duties and with regard to the basic ideals of his government. Discarding two and one-half years of dedicated endeavor of the Special Agent would have been a small price to pay to get the Government and its awesome taxing authority back on the path of fairness and decency.

The judgments which the Special Agent formed and embodied in his recommendation that Lenske be criminally prosecuted can only be described as grotesque. His two and

one-half years of investigation had convinced him that Lenske had evaded taxes in the amount of $11,465.74 for the year 1955. The trial resulted in a finding that Lenske's taxes for 1955 would have been $414.78. The Special Agent determined Lenske's taxes to be 27 times as much as the court found them to be. On an examination testing his accuracy, the Special Agent would have scored less than 4 out of a possible 100. For the year 1957 the Special Agent's report said that Lenske had evaded $19,412.88 in taxes. The judgment of the court was that his taxes were $1006.18. The Special Agent's report thus charged Lenske with nineteen times as much tax as the court found that he owed. The Special Agent's score was less than 6 out of a possible 100. For the year 1958, the report said Lenske should have paid $7,746.85. The court found that his taxes were $4,682.99, but that he had paid $2,000 in estimated tax. That left him owing $2,682.99. The Special Agent testified that he had, in his investigation, conducted perhaps 1500 interviews. He might well have found time to look at the Government's record of Lenske's 1958 payments of $2,000 of estimated tax. The Special Agent's report thus attributed three times as much tax to Lenske as he owed for 1958. This was the Special Agent's best score, some 33 out of a possible 100. For 1956, the Special Agent's report said Lenske should have paid a tax of $5,225.77. The court found that Lenske had no taxable income for 1956, but had a loss of $9,231.59. The Special Agent's examination score for 1956 would be, then, some almost incalculable number below zero.

The Special Agent was, so far as the record shows, technically competent and experienced. Such gross miscalculations as we have recited make it evident that some element, foreign to the functions and duties of a government tax officer, was corroding his judgment. Whether that corrosive element was that he had views differing from

Lenske's about the Lawyers' Guild, or about "Cuba, Laos, China, etc.," or about other policital and social problems, or was something else that we cannot even imagine, the consequence is that we have no confidence whatever in the Special Agent's conclusions in this case. Yet he was not only the Government's investigator but the Government's principal witness in the trial. Under his supervision the complicated charts and computations were prepared. He presented and explained them to the court. He testified that he interviewed more than 500 witnesses, perhaps as many as 1500, and read "thousands, thousands" of documents.

This case was prosecuted and tried by the "net worth" method. In *Holland* v. *United States* [54-2 USTC ¶9714], 348 U. S. 121, 129, the Supreme Court said, of that method of trial:

> Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

We follow that admonition of the Supreme Court.

In many net worth cases the prosecution proves that the defendant was able to purchase property or make expenditures during the tax year in excess of what he would have been able to do upon the income which he showed on his tax return. He got the money somewhere, and the Government proves a likely source from which it may well have come. If it did come from that source it was taxable, but was not shown on the return. Sometimes the defendant claims that it came from a cash hoard which he had held for many years, or from a gift or a loan from a relative. Sometimes the expenditures are made from cash, difficult to trace to and from the taxpayer.

No such trappings are involved in this case. There was no suggestion of a secret hoard. The money that came in to Lenske went into his bank account. His payments were made by check. He furnished his cancelled checks to the Special Agent, who said in his report that they "were substantially complete for the years 1945 through 1958" and that "For the most part they indicated the purpose for which they were issued." The Special Agent and his assistant were, with the defendant's permission, installed in the small library of the defendant's law office for many weeks or months. The Special Agent called upon the defendant for particular files as they were needed, and the defendant directed his employees to find and turn over the desired files. There was no instance, apparently, in which any paper or record relating to the defendant's innumerable transactions was not delivered to the Special Agent. The Special Agent testified, rather petulantly, that on a few occasions there was some delay in getting the defendant to direct his employees to promptly find and deliver requested papers. The defendant did have a law practice and many business affairs to attend to.

The Special Agent and his assistant spent many hours in the defendant's library hand-copying writings from the defendant's files and records. In these days of photostating machines, that was a very wasteful process. But instead of frankly asking the defendant if they might upon giving him a receipt for the writings, take them out and have them photographed, they concealed the writings in their brief cases when they left for lunch or at the end of the day, had them photographed, and sneaked them back into the defendant's files when they returned after lunch or the next morning.

The trial judge rejected the Special Agent's half-hearted claim that Lenske consented to the carrying out of the papers. The judge said, "It is irregular to have taken

them from the building without advising Mr. Lenske, and the proof is clear that that is what they did." The judge further said that he wanted the pertinent finding to show that Mr. Lenske did not know that the particular document under discussion was given out. We think the evidence shows that the Special Agent's conduct was not only irregular but was furtive and surreptitious, and far beneath the standard of what one expects from a public official. It is interesting that the Special Agent, in his report to his superior recommending that Lenske be criminally prosecuted, said:

> It is concluded that the taxpayer should be prosecuted for attempted income tax evasion for the years 1955 through 1958 and that the evidence is sufficient to secure a conviction. Inasmuch as the taxpayer is a well-known attorney in the Portland area, it is believed that this case would have a definite beneficial effect in this community.

Thus the Special Agent sought to upgrade the moral standards of taxpayers.

This case comes to us on the defendant's appeal from a judgment against him rendered after a second trial. The first trial began in February, 1963, before a judge and jury. After some eight weeks of trial and the hearing of 350 witnesses, the judge, the Honorable John R. Ross, died, and a mistrial was declared. Pursuant to the stipulation of the parties, the judge assigned to re-try the case, sitting without a jury, adopted the record of the proceedings before Judge Ross, but took additional evidence presented by both parties. Since the record made before Judge Ross, consisting of some 40 volumes of reporter's transcript, is a substantial part of the record before us, we make certain observations about the proceedings which produced that important part of the present record.

[APPENDIX]

As we have seen, the evidence relating to some 90 properties, numerous business transactions, of which the record does not indicate the number, and "thousands, thousands" of documents. The indictment stated that the defendant had attempted to evade and defeat his income taxes for the years 1955, 1957 and 1958 in designated large amounts, and that for the year 1956 he made a false return. The indictment gave no information as to which of his 90 properties, his numerous transactions, his thousands of documents, would be involved in the trial of the case. He knew that the Government had copies of all of his records and documents, because he had given them to the Government's agents. He knew that they had been studying them for two and one-half years. But even if he, like them, had had at his disposal all the resources of the United States, its Federal Bureau of Investigation and other investigating agencies, he could not have sought out and interviewed all the potential witnesses to all of his activities, to determine from which direction the attack would come, and then prepare his evidence to meet the attack. It would tax the imagination to conjure up a more frightening and frustrating situation than that in which his government has placed this citizen. The trial judge said to government counsel:

> The Government is the strongest litigant in the world. You have got the F. B. I. and all the government agencies available to you. You represent the strongest client in the world.

Nevertheless, in the first trial, the government counsel staunchly opposed the defendant's motion for a bill of particulars which would have given the defendant some little warning of what he was to be tried for. The court denied the defendant's motion.

Later in the trial, when the defendant sought to obtain copies of papers in the government files which might have been useful to the defense, government counsel said

that he had regularly furnished exhibits to the defendant "the night before" they were used, that he resisted giving out things from government files that the defendant should have no access to, that the defendant had even asked for statements of witnesses who had not testified. It thus seemed outrageous to counsel for "the strongest client in the world" that that client's citizen adversary should have even a moment's notice of what a witness would say to his detriment, or should be armed, as government counsel was armed, with the prior statements of the witness, with which to confront him if he departed from them.

In the Special Agent's two and one-half years of investigation, he had interviewed some 500, perhaps as many as 1500, persons. If any of those persons made statements which would have been helpful to Lenske, the Government's attitude was that Lenske had no right to know that, unless he found it out by his own effort and at his own expense. This attitude and conduct of the Government is in direct contradiction to the teaching of the *Holland* case, 348 U. S. 121. At page 132 the Court said, of the Government:

> . . . its failure to investigate leads furnished by the taxpayer might result in serious injustice.

Again at page 136 the Court said:

> When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

The Supreme Court could not have meant that if the Special Agent who follows up the lead simply makes up his mind that the lead produces nothing of advantage to the prosecution, what his investigation discloses becomes a government secret, inaccessible to the defendant, although what

the Special Agent learned by the use of the Government's unlimited machinery of investigation might have been thought significant by a judge or a jury if they had been allowed to learn of it. The Court could not have meant that the Special Agent should be the tribunal empowered to decide criminal tax cases.

Under the *Holland* teaching, a lead not furnished by the defendant but discovered by the Special Agent in his investigation would have at least equal status with a lead furnished by the defendant. The philosophy of *Holland* is that the trial of a tax fraud case by the net worth method places a defendant at a disadvantage dangerous to his liberty, and that some departure from the gamesmanship tactics of ordinary trials, even other criminal trials, is necessary to compensate for the disadvantage and make the contest more nearly equal.

The government investigation and trial of the instant case reflects none of the spirit and philosophy of *Holland*. The defendant's cross examination of the Special Agent developed pertinent information about the Special Agent's long and dedicated investigation. In answer to a question about a $500 item he said, "No, I overlooked that. I just missed it." He listed a check from an insurance company which said, "In full settlement of wind policy," as a fee, and added it to Lenske's taxable income and net worth. With regard to items which he attributed to Lenske personally but which might have belonged to Lenske's law partnership, which made its own tax return, he said, "I don't know if all of the fees got into that partnership, I had no way of determining that." The law library where the Special Agent worked over Lenske's papers for many weeks was the partnership's library, and the Special Agent was never denied any information sought from the partnership or Lenske.

The defendant presented an expert tax witness, Marx, whom the court regarded as an honest and highly competent tax expert. He, as an employee of the Internal Revenue Service, had had charge of supervising and training fourteen agents. After leaving the Internal Revenue Service he had set up an office and acted as a tax expert and witness for taxpayers and for the Government. In his 17 years in and out of the Government he had worked on more than 500 net worth cases. Although Marx had had for only a short time the materials which the Special Agent had worked over for two and one-half years, one significant mistake became apparent to him within the first half hour of his study of the Special Agent's charts and exhibits. His testimony pointed out error after error in the Special Agent's treatment of transactions large and small. Many of his corrections were adopted by the Government when it revised its charts. But of particular significance is Marx's testimony with regard to the Special Agent's failure to follow leads which would have led to the right answers. Several instances were given by Marx. Many of his answers, obtained by following leads, were, as we have seen, accepted by the Government without further controversy. Marx spoke particularly about the Special Agent's failure to use the microfilms, which banks make and retain and which identify the bank on which a deposited check is drawn, to determine whether the deposit represents taxable income, or the repayment of a debt, or a deposit for investment, or the payment of an insurance loss, or whatever else it might represent. Marx testified that in seventeen years of tax practice he had not once been unable to so trace a deposit to its source. The Special Agent appears not to have made use of this important, practicable and reliable follow-up method.

It may be asked what harm is done, after all, by disregarding the admonitions of *Holland, supra,* putting every-

thing into a chart showing increased net worth and having the Special Agent testify that it was prepared under his supervision and is right. There is still opportunity for cross examination and for witnesses for the defense.

What is wrong, in addition to its being contrary to the law laid down by the Supreme Court, is that such a process is outrageously unfair. The Government uses its resources, here for two and one-half years, to build up its case and its charts. It then gets its indictment. The taxpayer still has no notice of wherein he is charged with criminal conduct. At the trial, or shortly before, he begins to learn the enormous amount of detail of the Government's case. If he is financially able, and is lucky, he may acquire a tax expert who, in helping him to cross-examine the Government's Special Agent, and in giving direct testimony for the defense, will largely demolish the Government's case. But, as in the instant case, it may leave a remnant, a vestigium somewhat above the level of *de minimis*, so he may still, as in this case, be headed for the penitentiary.

What has happened to him is that the Government has not assumed the burden of proving, beyond a reasonable doubt, that he is guilty. It has assumed only the burden, with its unlimited resources and time, of preparing a mass of documentary evidence and charts incomprehensive to a layman, all prepared by the Government itself, and saying to the taxpayer, "Your task is to prove that *all* of what is contained in the charts is false, not merely that it is 96% false, but that it is all false. You do not have the time nor the resources that the Government had, but that is your misfortune."

As we have seen, the Government presented its case by the net worth method. By that method, the Government in effect sets the taxpayer's return to one side and constructs a new return for him. It thereby assumes the burden of proving, beyond a reasonable doubt, that the items in its

reconstructed return, so far as they are necessary to show that a tax, or a larger tax, was owed by the taxpayer, are true. In the instant case, for the four years in question, the court found that the defendant was entitled to deductions, from what was otherwise reconstructed as his income, of $85,641.88 for depreciation. Depreciation was thus a large and important item in the reconstruction, particularly in view of the fact that the amounts of taxes found to be owing were so small as to be almost trifling in comparison with the amounts charged in the Special Agent's report and in the Government's indictment. A relatively small variation in the amount of depreciation might have erased any tax liability for one or more or all of the years.

A Mr. Kolberg, the Government's expert appraiser, upon whose testimony the Government's depreciation figures were based, was testifying. The following colloquy took place between the court and government counsel, Mr. Alexander:

> The Court: Did you ever try a condemnation case?
>
> Mr. Alexander: Yes, your honor.
>
> The Court: It is all speculation.
>
> Mr. Alexander: Yes.
>
> The Court: All he [Kolberg] can do is speculate. You are dealing, as I said, in probabilities—these intangibles.
>
> Mr. Alexander: That is correct.

The testimony of the expert Kolberg makes it plain that he did not believe, beyond a reasonable doubt, that his figures were correct. He testified in detail as to the complicated method by which he valued the buildings on Lenske's properties, computed the ratio between land and building

and applied that ratio to the cost of the property. He then made his estimate of the economic life of the building to determine the percentage of depreciation for the taxable year. He then applied that percentage to the figure determined in the second preceding sentence, and the result was the depreciation for the year. If he was aware of prospective zoning or of a trend toward commercial development in the area which would result in the early demolition of the existing building, he would take that into account. If such a prospect was known to the taxpayer but was not known to the Government's expert, it of course received no consideration by him. Kolberg testified that he talked with people in the assessors' offices, real estate brokers, and neighbors in the area of the various properties for additional information as to values.

Of importance is the fact that Kolberg made no pretense that there was some arithmetical number which would be right and any other number, greater or smaller, would be wrong, either with regard to his estimate of the value of the building or of its economic life. As to the economic life, he estimated it in "five year jumps." Lenske had some 90 pieces of property of varying types, ages and conditions. Applying the five year jump to a tenant house that had somewhat more than ten years of life to give it a fifteen year life would reduce the percentage of allowable depreciation by one-third. A five year jump from just over thirty years to thirty-five years would have a much smaller effect on the percentage of depreciation.

The expert Kolberg, being asked as to whether his determinations of the economic life of the defendant's depreciable properties leaned toward the longer side or the shorter side, answered:

> No, they don't lean. In other words, as I acknowledged before, I am sure there is leeway, but there is

> leeway in both directions. I deal in round figures because I think that is the way we generally do things, and when I say 15, it could be 17, it could be 13 and it could possibly be a little bit more or a little bit less than that. But I say that is the point in the middle as I see it.

It will be remembered that the trial judge, in the colloquy hereinbefore quoted, had said of Kolberg's figures for the values of Lenske's buildings and land that they were "all speculation." The determination of how much of a deduction for depreciation Lenske was entitled to was arrived at by multiplying a figure which was "all speculation" by a percentage which, according to Kolberg's testimony quoted above, could vary by several percentage points.

The trial judge was apparently troubled by such a synthetic solution of a vital problem in a criminal case. After stating that Kolberg's approach and judgment impressed the court, and that in his opinion the Government, based on Kolberg's testimony, had given the defendant "a reasonable and liberal allowance for depreciation such that any additional allowance would be unrealistic and excessive," the court said:

> Nevertheless, out of an abundance of caution the Court has adopted the position of further increasing the defendant's allowance for depreciation by reducing the economic life by three years on all properties Kolberg assigned an economic life of five years.

The court assigned no other reason for this action than "abundance of caution." Thus the court, skeptical about the contents of the *pot pourri,* added some seasoning to make it less repulsive.

If this were a condemnation suit in which it was necessary to arrive at *some* figure in order to dispose of the controversy, it would be both proper and necessary to adopt

the estimates of some competent, honest and frank appraiser, such as Kolberg apparently was. It would rarely be necessary, we suppose, for the court, merely out of an abundance of caution, on its own motion, to add to or subtract from such figures, admittedly on a completely irrational basis. But this is a criminal case, and a close one. In all conscience, is it right to send a man to the penitentiary on the basis of a figure arrived at by the multiplication of an "all speculation" figure by another figure the proponent of which says is fifteen but says that if someone else said it should be thirteen or seventeen or possibly a little bit more or a little bit less, he, too, would be right?

The judge related how he had personally bought an old building for an investment, and had to assign some economic life to it on his tax return. He would have known that he couldn't write it off in five years, and that 50 years would have been too long a life. He did not remember what life he assigned to it. He said, "So you try to do the best you can. You come up with some life on it, even though it is an old building."

We are not aware of any precedent for a conviction of tax fraud by the net worth method in which the question of whether any tax was due was a close question and an important factor in the case was the amount of depreciation which the prosecution might properly assign to the defendant on a large number of miscellaneous properties owned by the defendant. We find it hard to imagine a case in which such a conviction would be defensible. In the instant case the Special Agent testified on cross examination that he had never recommended a criminal prosecution on the basis that items of depreciation were fraud items. But this very case is a case in which the crucial question of whether there is any tax due depends importantly on the amount of depreciation allowed.

One incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The court directed government counsel to check the record. Later government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the testimony of the Special Agent and the Revenue Agent was not transcribed.

Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*

The appellant's conviction is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Our disposition of No. 19,539 renders the appeal in No. 20,448 moot. It is dismissed.

Dissenting Opinion

CHAMBERS, Circuit Judge, dissenting: I would affirm these cases per curiam, but one vote will not do it.

The author of the foregoing opinion seems to be convinced that this is a case of guilt by association. What motivated the prosecution is by no means clear, but the defendant was not convicted on a "guilt by association" basis.

The record could sustain on a preponderance of the evidence basis a far greater deficiency in income than the trial judge found beyond a reasonable doubt. The trial judge gave the defendant every "break" I can imagine. But after doing so, it was abundantly clear to him, as it is to me, that the defendant was guilty.

The matter concerning the special agent's report, we should not use. The report at the threshold of the case was handed to the defendant and to the district judge. The defendant did not even ask to have the report marked for identification. To get it into our record, we had to send out and get it "for identification." To this I agreed, believing this court is entitled to see anything the district court saw. But our order did not adjudge that we were entitled to use anything therein. And, now the majority introduces a new principle of evidence: "Things merely identified, henceforth shall be considered in evidence."

A proper appraisal of the case is this: Defendant is a lawyer. Part of the time he had a lawyer, but it is obvious

he would not let the lawyer handle the case. Guilty as I believe the defendant is, a good lawyer, permitted to manage the case rather than the client running it, might have won the case. The defendant made his own bed and set it on fire. We pull him out of it.

Needless to say, I do not agree with the majority's analysis of how weak the government's case was or that Lenske's conviction departs from the standards of *Holland* v. *United States* [54-2 USTC ¶9714], 348 U.S. 121.

the government was sufficient to warrant conviction even without the proof of the incident complained of, we know of no rule that requires the government to limit its presentation to a minimum case simply to avoid a sensitive area of proof.

Appellant asserts that the trial court erred in refusing to provide him copies of appellant's and the government witness Kaszubowski's testimony before the grand jury. Judge Welch appeared voluntarily before the grand jury, testified at length, but did not testify in the case at bar. No showing of particularized need for either his own testimony nor that of the witness Kaszubowski was made. In such case it is not incumbent upon the trial court to provide access to the grand jury proceedings nor to examine them in camera at the request of the defendant. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395; United States v. Procter and Gamble Co., 356 U.S. 677; Bary v. United States, 10 Cir., 292 F.2d 53; Travis v. United States, 10 Cir., 269 F.2d 928, rev'd on other grounds, 364 U.S. 631.

Appellant also claims that he was denied a fair trial because a juror, asked upon voir dire if he had had any near relatives who had been involved in litigation that had been reviewed by the Supreme Court of Oklahoma, did not disclose